KSL Claremont Resort, Inc. d/b/a Claremont Resort and Spa *and* Hotel Employees and Restaurant Employees Union, Local 2850, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Cases 32–CA–20417 and 32–CA–20433

June 16, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 28, 2003, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

We agree with the judge, for the reasons she states, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize or deal with Leslie Fitzgerald as a union representative for unit employees and by denying Fitzgerald access to the facility in order to perform her collective-bargaining duties.[2]

We also agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by its February 7, 2003[3] issuance and subsequent maintenance of a rule prohibiting "negative conversations" about associates or managers.[4] In so concluding, we apply *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004). In that case, we held that where a rule does not expressly restrict Section 7 activity, the rule will violate Section 8(a)(1) only upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; [or] (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran*, supra, slip op. at 2. We find that the rule's prohibition of "negative conversations" about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful under the principles set forth in *Lutheran Heritage Village-Livonia*.[5]

We also agree with the judge's further finding that the Respondent did not cure the illegality by its later communication to employees about the rule. In agreeing with the judge that the Respondent's May 5 notice to employees failed to meet the requirements for repudiation established in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), we do not necessarily endorse all the elements of *Passavant*. The Respondent's May 5 notice, however, dealt exclusively with employee rights to discuss union matters. The notice said that: "We fully recognize and have repeatedly acknowledged your right to discuss Union matters at times and in circumstances that are consistent with our lawful no solicitation policies." The Respondent thereby ignored the exercise of Section 7 rights relating to concerted activity other than union activity, such as an employee complaining to a coworker about a supervisor, the gravamen of the unlaw-

[1] The judge inadvertently failed to include in her recommended Order the notice mailing provision in the event the Respondent closes. We correct this omission here.

There are no exceptions to the judge's ruling granting General Counsel's motion to strike Respondent's erratum to its posthearing brief.

Chairman Battista and Member Schaumber note that, in ruling on the Motion to Strike, the judge cited *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426 (2002), for the proposition that "excusable neglect" justifying untimely filing of documents "requires extenuating circumstances rather than a mistake." In the Chairman's and Member Schaumber's view, the holding in *Unitec Elevator* was more limited: "the miscalculation of a filing date, absent a showing of extenuating circumstances, does not constitute excusable neglect" under the Board's Rules and Regulations. 337 NLRB at 426.

[2] Member Schaumber agrees with his colleagues that Fitzgerald's behavior in attempting to push her way into a meeting between former employee Dolma and Manager Dickson was not so severe as to justify Respondent's refusal to deal with her as a union representative. He finds it unnecessary to rely on any implication in the judge's decision that Respondent would have no grounds for objection if Fitzgerald engaged in like conduct during contract negotiations.

[3] All dates are in 2003 unless otherwise indicated.

[4] The Respondent's rule stated: "Negative conversations about associates and/or managers are in violation of our Standards of Conduct that may result in disciplinary action." The term "associates" refers to employees.

[5] Member Schaumber does not rely on the unfair labor practices alleged in *Claremont Resort*, Case 32–CA–19883, cited by the judge, as a basis for finding this violation. Instead, in finding this violation, he relies on the context in which the rule was promulgated as well as on its text. The rule was included in a list of 10 employer policies distributed as a reminder to employees. Some of the policies dealt with customer service issues such as keeping voices soft and low and pushing linen carts as quietly as possible. Other policies on the list, however, dealt with working conditions such as clocking in and out procedures and required trainings. In the context of these latter policies, employees would reasonably read the rule prohibiting "negative conversations" about associates or managers as a prohibition on voicing complaints about managers generally rather than a restriction only on doing so in the presence of customers.

ful rule at issue here. Accordingly, while not passing on all of the aspects of *Passavant*, we nevertheless agree with the judge that the Respondent's May 5 notice did not cure the Respondent's unlawful conduct.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Claremont Resort and Spa, Berkeley, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Within 14 days after service by the Region, post at its facility in Berkeley, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 14, 2003."

Dated, Washington, D.C. June 16, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] Member Liebman joins her colleagues in adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by issuing and maintaining the rule prohibiting "negative conversations." Member Liebman agrees with the judge's analysis concerning the rule's illegality and the failure of the Respondent's subsequent notice to satisfy the requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Thomas Bell, Esq., for the General Counsel.
Patrick Jordan, Esq., Jordan Law Group, of San Rafael, California, for the Respondent.
Timothy Sears, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. At issue is whether KSL Claremont Resort, Inc. d/b/a Claremont Resort and Spa (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act),[1] by refusing to recognize and deal with a designated representative of Hotel Employees and Restaurant Employees Union, Local 2850, Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union). A further issue is whether Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act by maintaining a rule which prohibited negative conversations about other employees and management.[2]

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel and for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a California corporation with an office and place of business in Berkeley, California, is engaged in the operation of a hotel and spa. During the 12-month period ending May 16, Respondent derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $5000 which originated from outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that

[1] Sec. 8(a)(5) provides, in relevant part, that an employer must bargain in good faith with the representatives of its employees, regarding wages, hours, and terms and conditions of employment. Sec. 8(a)(1) provides that an employer may not interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights: "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" as well as the right to refrain from any such activities.

[2] All dates are in 2003 unless otherwise referenced. The charge in Case 32–CA–20417 was filed by the Union on March 5. The charge in Case 32–CA–20433 was filed by the Union on March 12. Consolidated complaint issued on May 16. Trial took place in Oakland, California, on September 4 and 5.

[3] Credibility resolutions have been made based upon witness demeanor, the weight of respective evidence, established or omitted facts, apparent probability, and reasonable inferences drawn from the record as a whole. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Respondent is a world-class 22-acre urban luxury resort hotel with an extensive spa and club and a variety of dining facilities. The spa alone occupies 20,000 square feet and contains 35 treatment rooms. Respondent essentially sells luxury and pampering services and a sense of relaxation in a hassle-free environment. In order to enhance this experience, appropriate employee behavior is explicitly detailed in a 70-page section of the employee handbook.[4]

On April 21, 1998, Respondent and the Union[5] executed a collective-bargaining agreement covering an appropriate unit of approximately 135 food and beverage service employees.[6] On September 15, 2001, this agreement expired. At the time of trial, no replacement agreement had been reached although since September 2001, the parties had engaged in about 20 negotiation sessions for a successor contract. The Union also represents about 65 housekeeping and front desk employees pursuant to a separate contract. In late 2001, the Union began an organizational campaign involving approximately 130 spa employees. At the time of trial, this campaign was continuing.

III. REFUSAL TO DEAL WITH UNION REPRESENTATIVE

A. The Refusal

On January 9, the Union designated Leslie Fitzgerald, one of their staff representatives, to deal with Respondent in negotiations and grievances.[7] On January 14, Respondent refused to deal with Fitzgerald "regarding labor relations, grievances or other union matters." Respondent noted that it would be pleased to continue dealing with Stephanie Ruby, secretary-treasurer of the union; Lead Negotiator Mike Casey, chief executive officer of Local 2 in San Francisco; Wei-Ling Huber, vice president; and Liz Perlman, union representative and organizer; all of whom had participated in prior negotiations and were familiar with the terms of the current and expired contracts.

B. Respondent's Reason for the Refusal

Fitzgerald worked in Respondent's spa from 1994 until October 2002. Throughout this time, Fitzgerald worked as a massage therapist, body treatment technician, attendant, and reservations agent. Since about January 2002, Fitzgerald was an open and active union proponent in the spa organizing effort and a member of the employee organizing committee.

There is no dispute that on October 5, 2002, Fitzgerald and other employees gathered in support of spa employee Kalsang Dolma, who wanted to rescind her resignation. Fitzgerald attempted to push past Security Guard Cooper in order to enter Spa Manager Ilene Dickson's office, where Dolma was meeting with Dickson, even though Fitzgerald knew that Dickson did not want Fitzgerald to enter the office and Dickson told Fitzgerald repeatedly that she was not welcome. There is no dispute that when Fitzgerald attempted to enter the office, Fitzgerald's and Cooper's shoulders collided. Neither was injured or lost their balance. There is also no dispute that Fitzgerald used profanity during the incident and that she was insubordinate in refusing to follow Dickson's directive not to enter Dickson's office.

General Manager Todd Shallan suspended Fitzgerald on October 8, 2002, and discharged Fitzgerald on October 23, 2002. Shallan discharged Fitzgerald based on written and oral firsthand reports received from Dickson, Front of the House Manager Jadd Elkeshen, Security Guard Reginald Cooper, and Security Director Robert Hand, as well as his review of notes taken during Human Resources Director Suzy de Sousa's subsequent interview of Fitzgerald and his discussion with de Sousa about that interview. Specifically, Shallan discharged Fitzgerald for egregious conduct in violation of the standards of conduct (attempted bodily injury to Security Guard Reginald Cooper,[8] publicly embarrassing behavior during an encounter with Spa Manager Dickson,[9] profanity addressed to Dickson during the same incident,[10] insubordination in refusing to follow Dickson's directions,[11] and leaving her work without permission[12]) and secondarily for Fitzgerald's refusal to take any

[4] The facts set forth in this paragraph were administratively noticed at the request of the parties. See decision of Judge Gerald H. Wacknov, *Claremont Resort and Spa,* JD(SF)-39-03 (June 6, 2003).

[5] Respondent denies that the Union is the designated exclusive collective-bargaining representative of the food and beverage service employees and denies that the Union has been recognized as such representative. I find, nevertheless, that Respondent has dealt with the Union as the exclusive collective-bargaining representative of these employees and entered into a collective-bargaining agreement recognizing the Union as the sole representative of the employees. Respondent presented no evidence to the contrary. Accordingly, I find the allegations of the complaint proven.

[6] Although Respondent denies the appropriateness of the collective-bargaining unit, I find that by entering into this agreement with the Union, Respondent agreed that the unit was appropriate for collective bargaining within the meaning of Section 9(a) of the Act.

[7] According to Fitzgerald and other union negotiators, Fitzgerald attended a negotiating session on January 9. She arrived at about 1:30 p.m., when the lunchbreak ended, and did not speak and was not engaged in the negotiation process. She left at 2 or 2:15 p.m. At the end of bargaining that day, the chief negotiator for Respondent said that just because nothing had been said about Fitzgerald's presence did not mean that Respondent agreed she could be there.

[8] Standard of conduct 1 sets forth unacceptable conduct as follows: "Fighting with or attempting bodily injury to another, threatening, intimidating, coercing or interfering with anyone connected with the Company or its business."

[9] Standard of conduct 5 states, in relevant part, that it is unacceptable to engage in, "Unethical, immoral or indecent behavior, or behavior that publicly embarrasses the Company."

[10] Standard of conduct 8 makes it unacceptable to use "profane, discourteous, abusive or rude language or action against another employee, supervisor, manager, guest or to others."

[11] Standard of conduct 7 states, in pertinent part, "Insubordination is defined as willful disregard or disrespect toward a supervisor or representative of management or failure to comply or perform work as required or assigned."

[12] Standard of conduct 14 states, in part, that it is unacceptable to, "take an unauthorized break or otherwise leav[e] the job without permission." The uncontroverted evidence herein is that Fitzgerald's work ended prior to the incident leading to her discharge.

responsibility for the incident or to show any remorse or acknowledgement that her behavior was wrong.

Following her discharge, Fitzgerald, who was already a part-time organizer for the Union, became a full-time union organizer and representative. The Union filed an unfair labor practice charge regarding Fitzgerald's suspension and discharge. It was dismissed for insufficient evidence on December 19, 2002. The Union's appeal was denied on February 11, because the investigation failed to establish that Fitzgerald was disciplined for conduct protected by Section 7 of the Act.[13]

Analysis

In general, both unions and employers must bargain in good faith with the representatives chosen by the other party. However, when the presence of a representative of one party will create ill will and render good-faith negotiations impossible, the other party is justified in refusing to meet with that representative. *King Soopers*, 338 NLRB 269, 269 (2002), quoting *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976).

Discharged employees may not be excluded from negotiations simply because they no longer work for the employer. See *Caribe Staple Co.*, 313 NLRB 877, 889 (1994), citing *Vibra-Screw, Inc.*, 301 NLRB 371 (1991); *Colfor, Inc.*, 282 NLRB 1173 (1987), enfd. 838 F.2d 164 (6th Cir. 1988), overruled in part on other grounds *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990). However, a discharged employee who, without provocation, physically assaulted the personnel director at the beginning of a grievance proceeding was held properly excluded from negotiations. See *Fitzsimmons Manufacturing Co.*, 251 NLRB 375, 379 (1980), enfd. sub nom. *UAW v. NLRB*, 670 F.2d 663 (6th Cir. 1982). Similarly, in *King Soopers*, supra, a former employee was properly excluded because in response to a minor scheduling matter, he threw a meat hook narrowly missing an employee; threw a 40-pound piece of meat into a saw, breaking the saw's blade; threw his knife into a box; threatened a supervisor; and refused to leave when ordered to do so.

However, the facts herein are more similar to those in *Long Island Jewish Hillside Community Center*, 296 NLRB 51 (1989). In that case a discharged employee was improperly excluded from negotiations. His actions in pushing and nudging another employee and uttering obscenities, although not to be condoned, were provoked. The Board held that the employee's presence at negotiations would not create ill will and make good faith bargaining impossible. Although Fitzgerald's actions were ill advised and, given Respondent's code of conduct, certainly would not be acceptable in relation to customers of Respondent, the actions upon which Respondent relied to discharge her do not persuade me that Fitzgerald's presence at negotiation would create ill-will or make good faith bargaining impossible.

The standards for behavior in negotiations are much different than the standards of conduct for an employee in a luxury hotel. Indeed, Respondent concedes this point when it stated at the hearing that as long as negotiations were held offsite, it would not be a problem to deal with Fitzgerald in negotiations. There is no dispute that although negotiations occur in Respondent's conference rooms, hotel and spa guests are not impacted by these negotiations. There is also no dispute that the 20-negotiation sessions thus concluded have been heated at times. Thus, to the extent a negotiator becomes visibly upset, shaking, or out of control, behavior attributed to Fitzgerald by Respondent's managers in their memoranda to Shallan, negotiations, in general, have been known to accommodate such behavior. Negotiations may also accommodate some profanity. To the extent that Fitzgerald attempted to push past Security Guard Cooper and their shoulders collided, this does not impress me as "violent" behavior or behavior that would reasonably put others in a position of fear of Fitzgerald.

Moreover, Fitzgerald was employed by Respondent for approximately 8 years prior to the October 5, 2002 incident. There is no other evidence of misbehavior on her part. Additionally, because spa employees are not represented by the Union, the incident of October 5, 2002, was unrelated to negotiations or contract administration. No one on Respondent's negotiating team was involved in the incident.

Finally, although Fitzgerald's actions on October 5, 2002, were unprovoked by Respondent, and although the issue of Dolma's resignation was viewed as a major issue by her friends and coworkers, in the general scheme of labor relations, such an issue is relatively minor. Thus, it must be concluded that Fitzgerald, in fact, overreacted to Dickson's refusal to allow her to be included in Dolma's resignation interview. However, these actions alone do not convince me that Fitzgerald's presence at negotiations, or on Respondent's property, would lead to ill will or make good faith bargaining impossible.

IV. MOTION TO STRIKE RESPONDENT'S ERRATUM TO POSTHEARING BRIEF

On October 27, Respondent filed an erratum to its posthearing brief. This erratum contained arguments and authorities not previously included in Respondent's initial, timely brief. General Counsel seeks to strike the erratum pursuant to Rule 102.111(b) and (c).

Respondent opposes the motion to strike stating that portions of the brief contained in the erratum were prepared prior to the filing deadline but accidentally omitted from the initial brief. Respondent also notes that no additional substantive conclusion was added to the brief. Rather, Respondent asserts that the heading, "Conclusion," was merely inserted with no additional argument.

The lawfulness of the February memorandum and the effectiveness of the May repudiation were not briefed in the initial brief but were added in the erratum. Further, the conclusion section was added in the erratum although some of the language in the conclusion was present in the initial brief.

General Counsel's motion to strike is granted. Pursuant to Rule 102.111(c) briefs must be filed within "a reasonable time" following the deadline "only upon good cause shown based on

[13] Specifically, the appeal was dismissed because,

> It could not be concluded that Ms. Fitzgerald's insistence on meeting with a manager was protected conduct, particularly where Ms. Fitzgerald was informed that the manager did not want to meet with her. Further, there was insufficient evidence to establish that the Employer treated Ms. Fitzgerald in a disparate manner from other employees when it suspended and subsequently terminated her.

excusable neglect." Any party seeking to invoke this rule, must file a motion stating the ground of "excusable neglect" upon which it relies for requesting permission to file untimely. Respondent did not do this but sought to circumvent the rule by denominating its supplemental argument as an erratum rather than an untimely filing. However, an erratum is appropriate for correcting misstatements or citations—not for adding additional argument, which is what Respondent's erratum contains.

In *Elevator Constructors Local 2 (United Elevator Services Co.)*, 337 NLRB 426 (2002), the Board overruled *Postal Service*, 309 NLRB 305 (1992), and held that "excusable neglect" would be analyzed pursuant to *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). The Board also took this opportunity to announce that henceforth strict compliance with Rule 102.111(c)'s requirement that specific facts be set forth with the motion to allow late filing. Accordingly, because no basis for "excusable neglect" was set forth with the erratum, General Counsel's motion to strike is granted.

Had Respondent set forth the facts which it proffers in its opposition to the motion to strike, accidental omission, this would also be an insufficient basis for allowing a late filing. As *Elevator Constructors*, supra, makes clear, "excusable neglect" requires extenuating circumstances rather than a mistake.

V. RULE PROHIBITING "NEGATIVE CONVERSATIONS"

On February 7, Respondent issued a "Top Ten List" to spa employees containing the following statement: "Negative conversations about associates and/or managers are in violation of our Standards of Conduct that may result in disciplinary action." On May 5, Respondent issued a statement acknowledging that the "negative conversation" rule was the subject of unfair labor practice proceedings. Respondent set forth employee Section 7 rights and continued,

> We wish to make it clear that our suggestion concerning negative conversations was limited to personal attacks unrelated to business considerations or issues and that we fully recognize and have repeatedly acknowledged your right to discuss Union matters at times and in circumstances that are consistent with our lawful no solicitation policies.

The memorandum does not admit any wrongdoing and does not assure employees that Respondent will refrain from committing future unfair labor practices.

As counsel for the General Counsel notes, *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), held unlawful an unenforced rule which prohibited making false, vicious, profane, or malicious statements toward or concerning the employer of any of its employees. General Counsel seeks to distinguish *Tradesmen International*, 338 NLRB No. 49 (2002), in which the Board held lawful an employer rule prohibiting disloyal, disruptive, competitive, or damaging conduct and slanderous statements or statements detrimental to the employer or its employees. General Counsel notes that in *Tradesmen International*, the rule specifically set forth examples of violative conduct, none of which were examples of conduct protected by Section 7. Secondly, General Counsel notes the rule in *Tradesmen International* was not issued in response to a union organizing drive.

Finally, General Counsel notes that Respondent's rule was implemented in the aftermath of multiple violations of Section 8(a)(1). In this regard, General Counsel cites *Claremont Resort and Spa*, JD(SF)-93-02 (November 25, 2002).[14] In that case, Judge Clifford H. Anderson found, among other things, that Respondent unlawfully informed employees that they could not talk to other employees about organizing activity when they were at work on the clock. Judge Anderson's decision is pending at the Board on exceptions.

Although a panel majority held that the rule in *Tradesmen International*, supra, was lawful, in agreement with General Counsel, I find the facts in *Tradesmen International* are distinguishable. As General Counsel notes, the employer therein provided examples of conduct which would violate its rule. Moreover, the employer in *Tradesmen International* clarified any potential ambiguities in its rule by providing examples. Finally, the rule at issue in *Tradesmen International* involved disloyalty. It did not specify that conversations alone might violate the rule. Respondent's rule, on the other hand, specifically prohibits conversations about associates or managers which are negative in tone. No examples are provided.

In *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), the employer maintained a rule prohibiting making "false, vicious, profane or malicious statements toward or concerning [the hotel] or any of its employees." Relying on *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988), and *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979), the Board held that the rule reasonably tended to chill employee exercise of Section 7 rights. There is virtually no distinction between the rule in *Lafayette Park* and the one maintained by Respondent. Noting that any ambiguities must be construed against Respondent,[15] I find that Respondent violated Section 8(a)(1) by maintaining the rule.

Moreover, as counsel for the General Counsel notes, Respondent's attempt to remedy the rule falls short of the requirements of *Passavant Memorial Hospital*, 237 NLRB 138, 139 (1978). Thus, because the May 5 clarification of the February 7 rule was untimely, did not unambiguously admit wrongdoing, and did not assure employees that Respondent would not interfere with employees' Section 7 rights in the future, the attempted repudiation fails.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) and (5) of the Act by failing to recognize or deal with Leslie Fitzgerald as a union representative for unit employees and by denying her access to the facility in order to perform her collective-bargaining duties.

2. Respondent violated Section 8(a)(1) of the Act by maintaining a rule prohibiting negative conversations about employees and/or managers.

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[14] Administrative notice is taken of this decision at the parties' request.

[15] *Lafayette Park Hotel*, supra, 326 NLRB 824 at fn. 1.

REMEDY

Having found that Respondent violated Section 8(a)(1) and (5) by failing to recognize or deal with Leslie Fitzgerald as a union representative for unit employees and denying her access to the facility in order to perform her collective-bargaining duties, I shall recommend that Respondent be ordered to cease and desist and to affirmatively recognize and deal with Fitzgerald as a union representative for unit employees. Having found that Respondent violated Section 8(a)(1) by maintaining a rule prohibiting negative conversations about employees and/or managers, I shall recommend that Respondent be ordered to rescind this rule.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

Respondent, KSL Claremont Resort, Inc. d/b/a Claremont Resort and Spa, Berkeley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize or deal with Leslie Fitzgerald as a union representative for the food and beverage service employees and denying her access to the facility in order to perform her collective-bargaining duties.

(b) Maintaining a rule prohibiting negative conversations about associates and/or managers.

(c) In any other like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action.

(a) Recognize Fitzgerald as a union representative for the food and beverage service employees and allow her access to the facility in order to perform her collective-bargaining duties.

(b) Notify the Union, in writing, within 10 days of this decision that it no longer has any objection to dealing with Fitzgerald and that it will do so, on request.

(c) Rescind the rule prohibiting negative conversations about associates and/ or managers.

(d) Post on its employee bulletin boards utilized for food and beverage employees copies of the attached notice to employees marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days of the date of this Order what steps the Respondent has taken to comply.

Dated. San Francisco, CA November 28, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Federal law gives you the rights to

Form, join, or assist a union
Chose representatives to bargain on your behalf
Act together with other employees for your benefit and protection
Chose not to engage in any of these protected rights

We give you the following assurances:

WE WILL NOT fail or refuse to recognize or deal with Leslie Fitzgerald as a union representative for the food and beverage service employees and WE WILL NOT deny her access to the facility in order to perform her collective-bargaining duties.

WE WILL NOT maintain the following rule, included in our "Top Ten List" distributed to spa employees: "Negative conversations about associates and/or managers are in violation of our Standards of Conduct that may result in disciplinary action."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in forming, joining, or assisting a union, choosing a representative to bargain on your behalf, or acting together with other employees for your benefit and protection.

WE WILL recognize and deal with Leslie Fitzgerald as a union representative for food and beverage service employees and that we will grant her access to the facility in order to perform her collective-bargaining duties and WE WILL notify the Union, in writing, of these facts.

WE WILL rescind the rule prohibiting negative conversations about associates and/or managers.

KSL CLAREMONT RESORT, INC. D/B/A CLAREMONT RESORT AND SPA

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."